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A Tale of Two Copyrights

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ABSTRACT

This essay explores two possible copyright regimes. The first uses costless and perfect price discrimination to enable copyright owners to capture the full market or exchange value of their work. The second also uses costless and perfect price discrimination, but allows copyright owners to capture only the persuasion cost for authoring and distributing a work. We can call the first regime, costless copyright maximalism, and the second, costless copyright minimalism. The choice between these two regimes is primarily distributional: Should we design copyright to allocate the surplus associated with copyrighted works to copyright owners or to copyright consumers? This essay explores why this distributional choice matters and explains why copyright minimalism is the choice we should make.

I. INTRODUCTION

"It was the best of times, it was the worst of times . . . ."[1]

* University Distinguished Professor, Texas A&M University. I would like to thank participants at the 2019 Akron IP Roundtable and participants at the 2020 Works-in-Progress IP Colloquium for their helpful feedback.

1. CHARLES DICKENS, A TALE OF TWO CITIES 1 (1866).

Imagine, if you will, a world of perfect information, where transactions are costless, and in that world, two possible copyright regimes.[2] The first enables copyright owners to engage in perfect price discrimination with respect to every form of access to their original works of authorship. In this regime, a copyright owner captures the full exchange or market value of its work, as measured by the maximum price each and every consumer is willing to pay for access. In that sense, the regime provides a value-based return to authorship. Such a regime necessarily provides incentives sufficient to ensure the creation and distribution of every socially valuable work. Therefore, it avoids the risk of dynamic efficiency losses from insufficient incentives. At the same time, by using perfect price discrimination, it does so without imposing any deadweight, static efficiency, or "access" losses. I will call this first regime "costless copyright maximalism."

The second regime is similar but differs in one key respect. Like the first, the second regime enables copyright owners to engage in perfect price discrimination with respect to every form of access to their original works of authorship. As a result, like the first, it provides incentives without imposing deadweight losses. Thus, it too avoids the risk of access losses. However, unlike the first regime, the second caps the incentives a copyright owner is entitled to capture for any given work at the minimum amount an owner will accept for authoring and distributing that work—the copyright owner's persuasion cost.[3] Turn-about is fair play after all. In a world where we can gather the information necessary to charge consumers the maximum price each will pay for access, we should also be able to gather the information necessary to pay a work's owner the minimum it[4] will accept for authoring and distributing the work. By enabling a copyright owner to capture precisely its persuasion cost for authoring and distributing a work, this second regime provides a cost-based return on authorship. Nevertheless, because the regime matches that return to each copyright owner's precise persuasion cost for authoring and

2. Of course, in such a world, there would be no efficiency justification for copyright. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). That's the point of this example.

3. In a world of perfect information, there should be no risk or uncertainty as to whether any given work of authorship will prove popular, and, if so, how popular. As a result, there should be no need for the successful works to cross-subsidize the unsuccessful works. To the extent risk or uncertainty remains, copyright owners will factor it into their persuasion costs. Thus, if a work costs $1 to author and distribute and has only a one in ten chance of success, then the copyright owner's persuasion cost for the work would be $10.

4. I use "it" intentionally here to recognize that the most valuable copyrights are almost invariably corporate-owned.

distributing the work, the second regime also provides sufficient incentives to ensure the creation and distribution of every socially desirable work. As a result, the second regime, like the first, avoids any dynamic efficiency losses from providing too little incentives. I will call this second regime "costless copyright minimalism."

In this essay, I consider which of these two regimes we should adopt. While this may seem a mere academic or hypothetical exercise, it is not. As machine learning and big data enable increasingly perfect price discrimination, the choice between these two regimes is coming increasingly within our grasp. Moreover, many recent legislative efforts in copyright reflect, though perhaps not consciously, a choice between these two regimes. The adoption of Article 17 in Europe and the Music Modernization Act's requirement that certain music services pay royalties for the public performance of pre-1972 sound recordings are two recent examples. The question then becomes: In a world where costless and perfect price discrimination is possible, should copyright owners receive the value-based return of costless copyright maximalism or the cost-based return of costless copyright minimalism?

Usually to answer questions regarding optimal copyright design, we turn to the so-called incentives-access balance. Unfortunately, it provides no help in choosing between these two copyright regimes. Both regimes provide seemingly optimal incentives with no lost access. The central difference between the two regimes is distributional. In the first, copyright allocates the surplus associated with works of authorship to copyright owners. In the second, copyright allocates that surplus to copyright consumers. Yet, so long as the total amount of surplus at stake is the same, traditional efficiency-based approaches would largely profess indifference between the two regimes. Whether we allocate a given surplus to copyright owners as producer surplus or to consumers as consumer surplus, it neither changes creative output nor limits access. In that sense, the consequences of the choice are merely distributional, and thus from an efficiency perspective, uninteresting.[5]

In this essay, I explore why that response is wrong. Distributional concerns matter. Indeed, if we are honest about the current state of economics, they are often all that matters, or at least, all about which we can say anything definitive.[6] Consider, for example, three possible

5. For the clearest articulation of the position, see LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2006).

6. Modern law and economics rely almost entirely on partial equilibrium models to support normative conclusions. Yet, we have known since Lipsey and Lancaster's work in the 1950s that such models are almost entirely useless for that purpose. *See* R.G. Lipsey & Kelvin Lancaster, *The General*

solutions to excess carbon dioxide emissions. In the first, nation states that supply fossil fuels, including coal, natural gas, and oil, join together and form a cartel to inflate the price of these energy sources. In the second, private, but publicly-owned companies that supply fossil fuels join together and form a cartel to inflate the price of these energy sources. In the third, nation states that consume fossil fuels join together and enact a carbon tax to inflate the cost of using these energy sources. There are important differences in: (i) the viability of each of these approaches—whether they can impose a surcharge on fossil fuel consumption; and (ii) the manner in which each would determine the surcharge's magnitude. Yet, from an efficiency perspective, each of the three would raise the price of fossil fuels and thereby achieve the overarching goal of reducing fossil fuel consumption. The principal difference between them is distributional. The choice of solution determines who collects and redistributes the surcharge. In the first, the fossil fuel producing states collect the surcharge and determine how it is allocated. In the second, fossil fuel companies collect the surcharge and determine its allocation. In the third, fossil fuel consuming states collect the surcharge and determine its allocation.

As a historical matter, beginning in the 1970s, we chose a version of the first approach, albeit unintentionally.[7] Whatever quibbles we may have about whether the surcharge the Organization of Petroleum Exporting Countries has imposed is high enough to adequately reduce fossil fuel consumption,[8] it has been the distributional consequences of that choice that have mattered thus far. Those distributional consequences have changed the world we live in. For example, that distributional choice

Theory of Second Best, 24 REV. ECON. STUD. 11 (1956) (showing that even simple partial equilibrium conclusions, such as monopoly in a given market reduces social welfare and should be replaced with competition, become unreliable in the presence of imperfections in other markets).

7. I recognize that the Organization of Petroleum Exporting Countries (OPEC) did not form to combat the risk of global warming. Yet, OPEC, through the surcharges it has imposed on oil prices since the 1970s, has done more to reduce carbon dioxide emissions over the last 50 years than any other organization. For data on the likely CO2 emissions but-for OPEC, and those with OPEC, see footnote 8 *infra*.

8. To get some sense for this, we can compare CO2 emissions for countries that export oil and otherwise similar countries that do not. For example, the International Energy Agency (IEA) estimates per capita CO2 emissions by country. In the Middle East, it divides the countries into those that export oil (Middle East A countries) and those that do not (Middle East B countries). The CO2 emissions per capita for the Middle East A countries in 2017 was 20.7 tons per year. The CO2 emissions per capita for the Middle East B countries was roughly two tons per year. The IEA similarly divides otherwise similar Asian states into Asia A, consisting of oil exporters, and Asia B, consisting of non-oil-exporting countries. Again, the CO2 emissions per capita for the Asia A countries was roughly 6.5 tons per year, where the CO2 emissions per capita for the Asia B countries were only roughly one ton per year. *World CO2 Emissions from Fuel Combustion* (2019), Data and Statistics, INT'L ENERGY AGENCY, www.iea.org/statistics [https://perma.cc/2PW3-BAVL].

provided at least some of the funding for, and thus contributed to, the September 11, 2001 terrorist attacks on the United States.[9] Those attacks in turn led the United States to war in Afghanistan. Roughly 2,300 American deaths and a much larger number of Afghan deaths resulted—all due to a distributional concern.[10]

This example is not atypical. Throughout human history, those who control the economic surplus that our civilizations have created have reshaped the face of our world. When governments controlled that surplus, we have gotten, just to name a few examples, the pyramids, the Taj Mahal, the Great Wall of China, any number of wars, and the Apollo moon landings. When religion[11] controlled that surplus, we have gotten, among other things, the cathedrals of Europe, the Crusades, and the Spanish Inquisition. When private individuals have controlled that surplus, we have gotten an idiosyncratic mixture of charitable endeavors and displays of conspicuous consumption.[12] We have even gotten charitable endeavors that are themselves displays of conspicuous consumption.

Distributional concerns matter. We should not ignore them or relegate them to secondary status. Of course, just as with efficiency concerns, we cannot always foresee how distributional choices will play out or what consequences they may bring. Nevertheless, there are principles we can use to consider our distributional choices. Those principles focus on two subsidiary questions: (i) to whom we should allocate society's surplus; and (ii) whether we should concentrate that surplus among the few, however chosen, or disperse it widely among the many.

9. The 9/11 Commission concluded that the funds to support Al Qaeda and the 9/11 attacks came from donations "primarily in the Gulf countries and particularly Saudi Arabia." THE 9/11 COMMISSION REPORT 170 (2004). For Saudi Arabia, the petroleum sector accounts for roughly 87% of Saudi budget revenues, 90% of export earnings, and 42% of GDP. *Best Countries for Business*, FORBES (2018), https://www.forbes.com/places/saudi-arabia/ [https://perma.cc/9H6U-WZYZ].

10. For American casualties, see U.S. Department of Defense, Casualty Status as of 10 a.m. EDT, July 6, 2020 (available at https://www.defense.gov/casualty.pdf). For Afghani casualties, see Friends Committee on National Legislation, Costs of War: By the Numbers, Mar. 15, 2011 (available at https://www.fcnl.org/updates/costs-of-war-by-the-numbers-396) (estimating 43,000 civilian casualties in Afghanistan since 2001 and 64,000 local military and police).

11. I recognize that sometimes religion and government have overlapped.

12. For examples from either end of the spectrum, compare Warren Buffett, My Philanthropic Pledge (2010) (available at https://givingpledge.org/Pledger.aspx?id=177) (pledging to give 99 percent of his wealth to philanthropic causes), with the ten most expensive watches in the world. *See* Top 10 Most Expensive Watches, Feb. 16, 2020 (available at https://www.wpdiamonds.com/top-10-expensive-watches/) (listing ten watches ranging in price from $5 million to $55 million).

As we think through a distributional choice, we need to be careful not to let efficiency-based principles color our thinking. "Eat what you kill," "reap where you have sown," and other similar principles rest on thinly disguised consequentialist impulses. Following these principles, the impulse suggests, will put more food on the table. It can be hard to disentangle these impulses and consider a distributional choice as purely and simply distributional. However, that is my goal here. In our tale of two copyrights, awarding more of the surplus to either copyright owners or copyright consumers will not change creative output, nor will it change access to that output. I know that runs against our intuitions. The copyright industries have spent years persuading all of us that more money for them will mean more and better works of authorship for consumers. That naïve consequentialism is hard to put aside; but that is what I ask you to do. In our tale of two copyrights, awarding the surplus to copyright owners will not lead to more and better works. Awarding the surplus to copyright consumers will not lead to fewer and worse.

The choice between the two copyright regimes is thus purely and simply distributional. Given that, the question becomes: How should we make it? My answer rests primarily on the second subsidiary principle. Specifically, we should adopt the copyright regime that will help distribute the available surplus as evenly as possible across society. That principle does not, however, resolve entirely our choice. As a general matter, copyright markets are winner-takes-all. As a result, broader copyright protection tends to concentrate surplus in the hands of the lucky few. In my view, this is undesirable. To avoid concentrating society's surplus in the hands of the few, we should generally prefer costless copyright minimalism. However, there is one situation where costless copyright maximalism may help disperse, rather than concentrate, surplus. Specifically, if the work of authorship is distributed through a natural monopoly intermediary, then at least in some cases broader copyright may help disperse the available surplus.

Section II frames the issue by examining the distributional choices reflected in the Music Modernization Act ("MMA") and by exploring the so-called value-gap argument that was the principal basis for enacting Article 17 in the European Union. Before critically examining the distributional preferences on which these legislative measures focused, Section III identifies residual efficiency concerns that may remain even in our theorized "costless" copyright regimes. As I have shown and explored elsewhere, incentives and access do not fully encompass the relevant efficiency concerns copyright implicates. Section IV then examines the central issue of this essay: if it is only the distributional question at issue,

how should copyright seek to allocate the surplus associated with original works of authorship? Section V revisits Article 17 and the so-called value gap argument that was its principal justification. Section VI concludes.

II. DISTRIBUTIONAL ARGUMENTS IN RECENT COPYRIGHT LEGISLATION

Distributional arguments that reflect the same choice as our tale of two copyrights have supported two of the most important recent legislative efforts to update copyright law. In 2018, in the United States, Congress passed the MMA. Among other provisions, the MMA required streaming services to compensate sound recording artists for the public performance of their pre-1972 sound recordings. There is no plausible argument that bestowing this retroactive windfall for work done, at a minimum 46 years ago, will lead those artists and rights holders to produce more or better music, either then or now. Instead, the argument is distributional. Streaming services are making money on this music. They should therefore have to share what they have earned with these rights holders. The proposition is not that this forced sharing and resulting windfall will lead to the desirable consequence of more and better music. It is the redistribution itself that is the desired consequence. Implicitly, the MMA reflects the principle of our theorized costless copyright maximalism regime. It adopts the view that copyright should strive to allocate more of the surplus associated with works of authorship to copyright owners and related rights holders.

Similarly, the so-called value gap provided the principal argument used to justify the European Parliament's adoption of Article 17 in 2018. It too was primarily distributional. Sir Paul McCartney defined the value gap in his July 3, 2018 open letter to the members of Parliament in the following terms: "The value gap is that gulf between the value these [User Upload] platforms derive from music and the value they pay creators."[13]

The International Federation for the Phonographic Industries (IFPI) defined it similarly, putting specific numbers to the gap: "YouTube, for example, pays less than €1 per user per year; in contrast, Spotify pays 18 times that figure. This gulf between the value of music exploited and compensation to creators is known as the Value Gap."[14]

13. Letter from Sir Paul McCartney to European Parliament, IFIB (July 3, 2018), https://www.ifpi.org/downloads/EuropeanParliamentSupportLetterJuly2018.pdf [https://perma.cc/KM4K-YS3Y].

14. THE EUROPEAN COPYRIGHT DIRECTIVE: 5 THINGS YOU NEED TO KNOW (2018), https://www.ifpi.org/downloads/European_Copyright_A3_Poster.PDF [https://perma.cc/88B6-CLQB].

Just as with the MMA and pre-1972 sound recordings, the value gap argument used to justify Article 17 is primarily distributional. YouTube is making lots of money from music. It should have to share more of that with rights holders who produce that music. Again, the implicit principle is copyright maximalism. Copyright should strive to allocate more of the surplus associated with works of authorship to copyright owners and related rights holders.

Unlike the MMA argument however, the value gap argument, although primarily distributional, offers at least the possibility of potential efficiency or consequential gains. Article 17 is not mere retroactive windfall. By redistributing surplus from YouTube to rights holders, there is at least some possibility that Article 17 will increase creative output. To the extent Article 17 is successful in redistributing rents from YouTube to rights holders, some of those rents may go to currently active artists. The rent redistribution may thus provide the sort of incentives for creative work at the margins of profitability that can lead to increased creative output.

Proponents of the legislation were quick to offer this possibility. The IFPI, for example, raised the specter that unless the value gap was closed, creative output would collapse: "If large technology platforms can exploit artists' content without paying fair license fees, we risk losing the next generation of Europe's artists and musicians."[15] Of course, the IFPI offered no evidence on the magnitude or severity of this risk. Instead, it merely raised the fearful possibility that a whole generation of artists and musicians might be lost if Parliament did not act.

This sort of fearmongering is a common approach for proponents of broader copyright. There is very little real evidence that copyright has ever increased creative output,[16] and none that it increases creative output in the digital world in which we are now living. Yet, time and time again,

15. *Id.*

16. The only empirical evidence that copyright has ever increased creative output comes from a study that finds a correlation between copyright's enactment and increased creative output of Italian operas in the 19th century. *See* Michela Giorcelli & Petra Moser, *Copyrights and Creativity: Evidence from Italian Opera in the Napoleonic Age*, (May 16, 2019), https://ssrn.com/abstract=2505776 [https://perma.cc/2APN-AUFJ]. Among other difficulties with the study, the most telling is the failure to account for confounding events. Specifically, the study focuses on a time period when France annexes two Italian states and imposes French copyright on them. Of course, at the same time as France imposed its copyright, it also imposed other aspects of the French legal system and appointed French governors to oversee the states. Given so many changes at the same time, it becomes difficult to reliably identify which change played what causal role. Maybe the increased opera production (if it occurred) was due to the adoption of French copyright. On the other hand, maybe the French governor was a fan of opera, and the increased opera production (again, if it occurred) was patronage driven.

the proponents of broader copyright insist that if something is not done, creative output will collapse and civilization as we know it will end.[17] For example, in 1982, during the hearings surrounding the *Sony Corp.* decision, one of the law firms representing the Motion Picture Association of America boldly proclaimed: "Unless Congress acts to compensate copyright owners for the home taping of their intellectual property, the audiovisual marketplace will become a barren wasteland of programming that does not edify, nor inspire, nor entertain."[18] Of course, Congress did not act to compensate copyright owners for home taping. And if you have watched television recently, you know that the MPAA was right: television has become a barren wasteland.

In my recent book, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY,[19] I presented the first comprehensive and rigorous empirical test of the relationship between copyright, money, and creative output. The book examined the recording industry over a 55-year period from 1961 through 2015. This was a period of momentous change for the industry. During these 55 years, Congress first established the sound recording copyright for works fixed after February 1972, and then the rise of file sharing in 1999 effectively gutted it.[20] Accompanying this legal rise and technological fall of the sound recording copyright were very large movements in industry revenue. At the start of the study, the industry was earning under $4 billion annually from shipments of recorded music in constant $2013.[21] Even without a sound recording copyright, revenue from annual shipments rose somewhat from 1961 through 1971.[22] Nevertheless, from 1961 through 1969, revenue from shipments of recorded music remained generally low, averaging $6.9 billion ($2013) annually. With the enactment of the sound recording right,

17. *See* Mark A. Lemley, *Is the Sky Falling on the Content Industries*, 9 J. TELECOMM. & HIGH TECH. L.J. 125 (2011).

18. JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR 229 (1987); *see also Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 142 (1983) ("Unless we do something to insure that the creators of the material are not exploited by the electronics revolution, that same revolution which will make it possible for almost every household to have an audio and video recorder will surely undermine, cripple, and eventually wash away the very industries on which it feeds . . . .") (statement of Howard Oliver, Executive Secretary, American Federation of Television and Radio Artists).

19. GLYNN LUNNEY, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY (2018).

20. *Id.* at 59–74.

21. *Id.* at 68.

22. *Id.* at 68–69.

annual revenue from recorded music rose more substantially. It was not always a steady rise. Rather, revenue from recorded music rose and fell in the 1970s and 1980s with the ebb and flow of the economy generally. Nevertheless, shipments in the 1970s and 1980s averaged $11.0 billion ($2013) annually. This was a nearly 60% increase over annual shipment revenue in the 1960s. The enactment of the sound recording copyright in 1971 helped transfer some $82.5 billion ($2013) from copyright consumers to copyright owners during the 1970s and 1980s. In the 1990s, a combination of law, technology, and a growing economy pushed sales of recorded music to a peak of $20.7 billion ($2013) in 1999.[23] Taken as a whole, the 1990s represented the peak revenue decade for the recording industries over the last seventy years. From 1990 to 1999, revenue from shipments of recorded music averaged $17.5 billion ($2013) annually. This represented another nearly 60% increase in annual shipment revenue compared to the 1970s and 1980s. By forcing consumers to pay more for music, copyright helped redistribute $64.6 billion ($2013), compared to the 1970s and 1980s, and $105.8 billion ($2013), compared to the 1960s, from consumers to the recording industry during the 1990s. Fortunately for music lovers, in 1999, Napster opened its virtual doors, and, with the rise of file sharing, industry revenue from shipments of recorded music began to fall.[24] This post-file sharing era presented a challenging time for the recording industry. By 2014, shipment revenue had fallen to under $7 billion ($2013)—a level not seen since 1966.[25] From 2000 through 2014, revenue from recorded music averaged $12.1 billion annually—a 31% fall from the peak revenue 1990s.

This rise and fall of the sound recording right, and the corresponding rise and fall in industry revenue from shipments of recorded music, provides an excellent natural experiment to test for a relationship between increased revenue and increased music output. Copyright's consequentialist premise is that paying more money to the recording industry in return for popular music will yield more and better music. As a hypothesis, it seems simple, intuitive, and straightforward. Too bad it was wrong.

For the recording industry, from 1961 through 2015, more money was not associated with more or better music. Using four different measures of music output that considered both quantity and quality, I performed hundreds of regressions searching for the supposed positive

23. *Id.* at 68.
24. *Id.* at 69–75.
25. *Id.* at 75.

correlation between revenue and music output.[26] Yet, I could find no such correlation. Increased revenue for the music industry did not lead to more and better music. To the contrary, where a statistically significant correlation was present, it was negative.[27] Over the last 60 years, more money led to less music, *ceteris paribus*.

Little wonder then that proponents of broader copyright have shifted from consequentialist justifications for copyright legislation to distributive and fairness concerns. There is simply no evidence that effective copyright protection increases creative output. There is, however, mounting evidence that effective copyright protection reduces it. Unable to mount any plausible efficiency-based arguments, proponents of broader copyright argue that redistributing more of society's wealth to copyright owners is desirable for its own sake. Before we move to examine those distributional arguments directly, there remain some crucial efficiency concerns we must first consider.

III. EFFICIENCY CONCERNS BEYOND INCENTIVES AND ACCESS

In our two copyright regimes, by assuming perfect price discrimination, we have eliminated the potential for lost access. With perfect price discrimination, anyone who desires access to a work for any reason will get that access at a price they are willing to pay. No one will be denied access simply because they cannot afford to pay as much as someone else. To the extent that the incentives-access paradigm purports to offer a complete accounting of copyright's efficiency costs and benefits, eliminating the potential for lost access would seem to have eliminated copyright's costs. Unfortunately, lost access is not the only efficiency cost that copyright generates. As a result, even with perfect price discrimination, copyright maximalism is far from costless.

If we assume that a new work of authorship costs $1 to produce and distribute and has a value of $10, measured by the willingness of consumers to pay, the choice our two copyright regimes presents is whether the $9 surplus should be allocated to the copyright owner or to the work's consumers. Even in the absence of lost access, assigning that surplus to the copyright owner through copyright maximalism would impose three types of efficiency costs. First, assigning the surplus to the copyright owner would lead the copyright owner to expend resources in an attempt to capture that surplus.[28] Such rent-seeking expenditures would

26. *Id.* at 84–156.
27. *Id.* at 120–21, 155–56.
28. *See id.* at 24–30.

impose an efficiency loss by converting some of the available surplus into cost. Second, assigning the surplus to the copyright owner would push some authors and artists onto the backward-bending portion of the labor supply curve.[29] By doing so, copyright maximalism would reduce the creative output of our most popular artists and authors. Third, assigning the surplus to the copyright owner would reduce social welfare by encouraging overinvestment in, and hence overproduction of, original works of authorship.[30] With copyright maximalism, resources would be devoted to creating new works of authorship even when society would more highly value their use elsewhere in the economy.

Each of these efficiency concerns suggests that even our theorized regime of costless copyright maximalism would not, in fact, be costless. Each justifies, from an efficiency-based perspective, a preference for copyright minimalism over copyright maximalism. However, in order to focus on the distributional issue directly, for purposes of this essay, I will put these costs to one side and assume that they do not exist. This brings us squarely to the question presented: How should the surplus be distributed if it is purely a distributional issue?

IV. SENSIBLE DISTRIBUTIONAL PRINCIPLES

Before answering that question, I should briefly address the argument that the surplus associated with a work of authorship can and should be allocated based solely upon but-for factual causation. Obviously, the notion that we might award value to the one who created it can seem innocuously sensible. However, the assertion that one person has created something of value fundamentally misunderstands the nature of value in competitive markets. If we define value as the price a consumer is willing to pay to avoid doing without, that price, and hence the thing's value, will necessarily depend upon how much the consumer has to spend on everything else that she wants. We can determine that only if we hold prices and costs constant in every other market. While adopting such a partial equilibrium approach makes the math easier, it conceals the distributional choice being made.

29. *See id.* at 157–92.

30. This risk arises from either (i) the theory of the second best, where other markets do not fully internalize external benefits in the same way, *see* Glynn S. Lunney, Jr., *Copyright's Price Discrimination Panacea*, 21 HARV. J. L. & TECH. 387 (2008); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483 (1996); or (ii) from the theory of superstar or winner-takes-all markets, where the winners capture a higher private value than the social value they create. *See* LUNNEY, *supra* note 19, at 34–37; Glynn S. Lunney, Jr., *Copyright and the 1%*, 23 STAN. TECH. L. REV. (forthcoming 2020).

To illustrate, consider a simple two-good market. In one market is a necessity: food.[31] Given the applicable legal rules, the market for food is competitive. As a result, the food is made available at cost. In the other market is a luxury: music. Given the applicable legal rules, the market for music entitles music producers to a value-based return, defined as willingness to pay. Consumers have identical preferences and starting endowments, so we can focus on a single consumer with an initial endowment of $100. The cost of supplying the food the consumer wants is $20. In a competitive market, that $20 is also the food's price. The cost of supplying the music that the consumer wants is also $20. However, because of the legal rules, the price the consumer pays is not the music's cost to produce, but its value to the consumer. Because there are no other goods in the market and it is a single period game, the consumer's reservation price for music, defined as what the consumer is willing to pay to avoid doing without, is whatever she has left after she buys food. If her initial endowment is $100 and she pays a cost-based price for the food of $20, she has $80 left over. That is her reservation price for the music, and with legal rules that support a value-based price system for music in place, that is what our consumer is willing to pay, and will have to pay, for the music. Under these assumptions, when a musician creates the music, it would seem to have a value of $80.

However, the notion that the musician has created "value" of $80 is an illusion. If the cost of food goes up, so that the consumer now has to pay $30 for the food she wants, then the value of the music goes down, from $80 to $70. On the other hand, if the cost of food goes down, so that the consumer now has to pay $10 for the food she wants, then the value of the music goes up, from $80 to $90. Thus, the value of the music depends on the cost and price of food.

Similarly, if the consumer's initial endowment goes up or down, then the value of the music will also change. For example, if the consumer's initial endowment was $110, instead of $100, then the value of the music would rise to from $80 to $90. Or if the consumer's initial endowment was $90, instead of $100, then the value of the music would fall from $80 to $70. Again, the value of the music is not a function of the musician's efforts but of how much the consumer has left after buying food.

Value is also a function of the applicable legal regime. For example, by adopting different legal rules, we could reverse the pricing in the two markets. Under a different set of legal rules, the consumer might have to

31. This discussion is adapted from, and extends, the two-good model I have presented elsewhere. *See* LUNNEY, *supra* note 19, at 44–49.

pay a value-based price for the food she wants and a cost-based price for the music. In that case, the consumer would, under the starting assumptions, pay $20 for music and $80 for food. In this world, again if we define value as the price a consumer is willing to pay, then the value of the music drops from $80 to $20. That would be all our consumer would be willing to pay for the music because it would be all our consumer had left to purchase luxuries, such as music, after she has paid for the necessities in her life. That is also the most likely result if law and technology enabled perfect price discrimination, and hence value-based pricing, in both markets. In this variation, the value of the music does not depend on the effort of the musician, but on the pricing rules in the market for food.

As this example illustrates, if we define the value of music as the price the consumer is willing to pay, the value of music does not depend solely on musician's efforts or the intrinsic quality of the song. Nor does it necessarily measure the musician's contribution to the economy. For a song of any given quality, its value, defined as the consumer's reservation price for the music, depends upon the cost of the food, the surplus the consumer has left after purchasing her food, and the legal regime that controls the price of food. If we hold initial endowment and cost of food constant, require cost-based pricing for food and allow value-based pricing for music, and focus solely on what the consumer is willing to pay for music, it might seem like the musician created a song with a value of $80. That perspective reflects myopia, however. The conclusion of but-for causation is an illusion that a narrow-minded focus on the price of music alone drives. If we change the consumer's initial endowment, or the cost of food, or the legal regime for pricing food, the "value" of the song would be different.

In a market economy, no single person creates the value of a thing.[32] As this example illustrates, the price a consumer is willing to pay to avoid doing without any one thing in the economy will depend upon the prices the consumer has to pay for everything else and the resulting surplus she has left to spend on that one thing. Depending on the legal rules, the cost of food and music, and the consumer's initial endowment, the price the consumer will be willing to pay for the music can vary, in our example,

32. Edwin C. Hettinger, *Justifying Intellectual Property*, 18 PHIL. & PUB. AFFAIRS 31, 38 (1989) ("Market value is a socially created phenomenon . . . ."); Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, *supra* note 30, at 574. ("Whoever is responsible, factually, for creating the physical product itself, the *value* of the product in our market economy will always be joint because it depends entirely on whether consumers have any 'surplus' resources with which to purchase the product.").

anywhere from $20 to $90. As a result, while our musician may have created the song, she did not create its value. Factual causation is thus an insufficient basis for allocating value in a market economy.

Moreover, markets do not necessarily award value to those who create it. Again, consider our farmer-musician example, where food and music both cost $20, and the consumer's initial endowment is $100. As we have seen, if the legal regime ensures cost-based price pricing for food and value-based pricing for music, the musician captures $80, and the farmer only $20. What if the farmer works harder and through his efforts develops an innovation that decreases the cost of food by $10? Surely, the market will reward the farmer for adding value through his hard work. But it does not. So long as the legal regime ensures cost-based pricing for food, the farmer's hard work will reduce his earnings in the marketplace from $20 to $10. The musician's earnings, on the other hand, will increase from $80 to $90. With cost-based pricing for food and value-based pricing for music, the musician captures the fruits of the farmer's labor.

We can see the same interaction in real world markets. Consider the pay for college football coaches. In most states, the highest paid public employee is the football coach for the state's flagship university.[33] However, those higher earnings do not mean the university's football coach is the state employee who creates the most value. Even if you really like college football, good coaches are just one of the many factors of production that must come together to create the product (college football) and its associated revenue. These other factors are every bit as much but-for causes of the value of college football. However, unlike a good coach, some of these other factors do not enjoy market power and therefore recover only a cost-based return for their contribution. Indeed, one of the most essential factors, the players, are paid nothing at all. As a monopoly factor of production, good coaches are able to demand a value-based return for their contribution. As a result, they end up collecting a disproportionate share of the revenue associated with college football. That is why the top college coaches are so highly paid. It is not because they create proportionally more value for society than, for example, the top collegiate players.[34]

33. *See Who's the Highest Paid Person in Your State*, ESPN (Mar. 20, 2018), http://www.espn.com/espn/feature/story/_/id/22454170/highest-paid-state-employees-include-ncaa-coaches-nick-saban-john-calipari-dabo-swinney-bill-self-bob-huggins [https://perma.cc/DWN6-RM7X] (stating that in 2017, 31 of the 50 states' payrolls were topped by a football coach and another eight were topped by a men's basketball coach).

34. In the professional sports leagues, even the top coaches are not paid more than the most talented players.

As a general rule in our market economy, it is not those who create value who become rich, but those who are well positioned, legally and technologically, to capture the value others have helped create. More than 30 years ago now, Professor William Baxter illustrated for me how a market would allocate rents or value using a simple hypothetical that involved a pair of shoes.[35] If each shoe costs $5 to produce, and shoes are sold in a competitive market, a pair of shoes will cost $10. Even if every consumer's reservation price for a pair of shoes is $20, consumers would still pay only $10 for a pair of shoes. In a competitive market, if any one producer tried to raise its price, consumers would simply buy from another producer. As a result, the $10 difference between each of our consumer's reservation price and the shoe's price (and cost) remains in consumers' pocket as consumer surplus. In contrast, if a company holds a monopoly over shoe production, then the company will charge a value-based price for shoes. Instead of $10 for a pair, each consumer will have to pay $20. With a shoe monopoly, the $10 in surplus will convert from consumer surplus to producer surplus. Yet, it is not necessary for the company to hold a monopoly on both left and right shoes to capture a full monopoly profit on shoe production. If the company holds a monopoly only on left shoe production, while the right shoes are produced competitively, the company will still capture the entire surplus associated with shoe production.[36]

While simple, this two-shoe hypothetical explains a great deal of how markets today allocate surplus or value. Often the richest people today do not contribute the most value. Rather, they hold a monopoly position on a product that may have little value on its own, but when combined with other competitively supplied factors of production, creates an exceedingly valuable joint product. Many of the rich in our society today are essentially monopolistic left shoemakers. As such, they capture the value not only of their own labor, but the value of all of the others who contribute to the joint product as well. For example, it is not software alone that made personal computers valuable. After all, what would Microsoft's operating systems be worth without the hardware to run it on? Instead, it is the combination of hardware and software that made personal computers valuable. Yet software producers, such as Microsoft executives Bill Gates, Paul Allen, and Steve Ballmer, became far richer than the

35. I first recounted this example elsewhere. *See* Glynn S. Lunney, Jr., Comment, *Atari v. Nintendo: Does a Closed System Violate the Antitrust Law?*, 5 HIGH TECH. L.J. 29, 39–41 (1990).

36. *Id.* In this situation, the right shoe is priced competitively at its cost of $5, and the left shoe is priced at $15. This price enables the left shoe maker to capture the full $10 surplus associated not with the left shoe alone, but with a pair of shoes.

executives of personal computer hardware manufacturers because copyright made the Microsoft operating system a monopoly complement to the personal computer hardware that others provided in largely competitive, and therefore cost-based, markets.[37]

Similarly, it is not Google's search engine alone that is valuable. After all, what would an Internet search engine be worth if there were no content on the Internet? Instead, it is the combination of that search engine with all of the Internet's wondrous content that is valuable. Yet, the founders of Google became rich in a way that those who helped contribute to the Internet's wondrous content did not.[38] Just like football coaches and Microsoft software, Google's search engine was a monopoly complement to the Internet content others provided, largely on a cost basis. Google's owners therefore captured the full value not of their search engine alone, but of a searchable Internet full of wondrous content. Other examples abound. In today's economy, platforms such as eBay, Uber, and Facebook are all effectively monopolistic left shoemakers. As the two-shoe hypothetical and these real-world examples illustrate, to capture a full monopoly profit on the joint product, all you need is a monopoly over one of the necessary factors of production. Yet, despite capturing the full value of the associated joint product, these monopolistic left shoemakers are only one of the but-for causes of that joint product and its associated market value.

In a generally competitive market economy, the two-shoe hypothetical extends far beyond these specific cases of joint products. At some level, in a generally competitive economy, goods in one market are complements to goods in all other markets. As the two-good model featuring food and music above illustrated, if a consumer has more surplus left over after purchasing food, she can afford to purchase more luxuries, such as music, that she enjoys. In which case, a monopoly over any one market can enable the monopolist to extract the full surplus from the economy as a whole. For the consumer who needs a life-saving

37. Two of these three Microsoft executives, Bill Gates and Steve Ballmer, are still on the Forbes list of the richest people in the world. *See Billionaires: The Richest People in the World*, FORBES (Mar. 5, 2019) (identifying Bill Gates as the second richest with $96.5 billion and Steve Ballmer as the 19th richest with $41.2 billion). At the time of his death in 2018, Paul Allen was the 44th richest with $20.3 billion. Megan Elliott, *Microsoft's Paul Allen: His Net Worth and All the Businesses He Was Involved In Over the Years*, SHOWBIZCHEATSHEET (Jan. 31, 2019), https://www.cheatsheet.com/entertainment/microsofts-paul-allen-his-net-worth-and-all-the-businesses-he-was-involved-in-over-the-years.html/ [https://perma.cc/K9Z2-UQUQ]. In contrast, on the hardware side, only Michael Dell breaks the top 50 as the 25th richest with $34.3 billion.

38. On the Google side, Larry Page is the tenth richest person according to Forbes with $50.8 billion, and Sergey Brin is the 14th with $49.8 billion. FORBES, *supra* note 37.

medication or who, at least metaphorically, cannot live without her favorite song, there is little difference between living in an economy with a monopoly on that medication or song alone and living in an economy with a monopoly on every available good. For the producer that is looking to capture the economy's full surplus through monopolistic pricing, there is no need to hold a monopoly position in all markets. It is enough that the producer holds a monopoly on any life-sustaining or life-improving good.[39] As the two-good model featuring music and food above illustrates, whether the producer holds a monopoly on food, music, or both, the result is the same. The producer captures, and the consumer pays over her full surplus. Only the heterogeneity of consumers, varying degrees of market power held by different entities in different markets, and our own preconceptions prevent us from seeing the model's predictions fully realized in the economy as a whole.

As a result, rather than factual or but-for causation, we must look for other principles to govern our decision as to how to distribute society's surplus. At the outset, I suggested that those principles would focus on two issues: (i) to whom we allocate the surplus; and (ii) whether we should concentrate the surplus in the hands of the lucky few or disperse it to the many. My approach on these two principle is simple. With respect to the first, I would devise legal rules that generate markets that allocate more of the surplus to those who share, and in ways that reflect and reinforce, my values. On the second, I would disperse rather than concentrate that surplus.

The first principle has a stark version: Don't give society's surplus to those who will use it to try and kill me or those for whom I care. Al Qaeda and Osama bin Laden provide a historical illustration of what happens when we fail to follow this principle.[40] But there is also a more generalizable version. Wealth is power. When we allocate more of society's surplus to a particular individual or group, we give that individual or group more power to shape our society moving forward. If we give more of society's surplus to individuals who value faith, family, and country, they are likely to use the power that surplus gives them to build a society with similar values. If, on the other hand, we give more of society's surplus to pleasure-seeking hedonists, then we should not be surprised to find that our society becomes increasingly hedonistic. We should therefore be careful to allocate surplus to those whose values we

39. As long as there are no other monopolists in the economy.

40. It also illustrates that "we" do not all share the same values.

share and to those who will use the power that surplus gives them to forge a society that values what we value.[41]

We see this principle at play in the debate over Article 17. In advancing the "value gap" argument in favor of Article 17, proponents of broader copyright emphasized the critical cultural role artists and authors play. In his open letter supporting what became Article 17, Sir Paul McCartney, for example, wrote: "Music and culture matter. They are our heart and soul."[42] In its materials supporting Article 17, the IFPI emphasized the same soundbite: "Music and the arts are at the heart of European identity and culture, they reflect and celebrate our core values."[43]

Copyright supports artists and authors. As a statement of values that we should support, who could possibly oppose that? Yet, when we move from consequentialist copyright, where copyright protection increases creative output, to distributional copyright, where it no longer does, copyright protection becomes a zero sum, or perhaps a negative sum, game. With distributional copyright, we must abandon the pretense that copyright can advance the interests of both copyright creators and copyright consumers alike. With distributional copyright, supporting artists and authors by giving them a larger share of society's surplus necessarily comes at the cost of giving less to everyone else. Thus, it is not that I oppose authors and artists, it is that I chose to support teachers, nurses and doctors, engineers, construction and factory workers, farmers and ranchers, and all the others who make our civilization possible. As a statement of values, who could oppose that?

In determining to whom society's surplus should go, the question becomes: What kind of society do we want to create, and what kind of work do we want to value? For example, do we want to reward form or substance? Should we establish legal rules that yield a market that generates a larger payday for Neil Armstrong, who actually walked on the moon, or for Ryan Gosling, who portrayed Neil Armstrong in a movie? With the broad copyright protection our laws currently provide, Ryan Gosling earned more. If we had no copyright, or a much shorter and narrower copyright, Neil Armstrong would have earned more. Similarly, do we want to establish legal rules that yield higher returns for the members of our military, first responders, and teachers, or for actors who

41. Obviously, to the extent you and I disagree on those values, each of us should strive to allocate surplus to those who share my or your respective values.

42. Letter of Sir Paul McCartney to European Parliament, *supra* note 13.

43. THE EUROPEAN COPYRIGHT DIRECTIVE: 5 THINGS YOU NEED TO KNOW, *supra* note 14.

portray them on television? Again, broad copyright will lead to markets with higher returns for the actors; narrower or no copyright will lead to markets where actors do not earn disproportionately more than those they portray. For me, the notion that we should have such broad copyright protection that Ryan Gosling earns more for portraying Neil Armstrong than Neil Armstrong earned himself is a travesty—a mockery of all that I hold just.

Sir McCartney and the IFPI insist that music and the arts are the core of our civilization. But they are not. The core of our civilization is more banal: drinkable water, efficient sewer systems, sufficient food and housing, adequate medical care, and an effective education system. It is only once we have those essentials that luxuries such as music begin to matter. For those who are unpersuaded, I have a simple proposition. I will do without music created by others for a month, if you will do without food grown, raised, or caught by others for the same period. It is only from a certain, incredibly entitled perspective that one can view music and the arts as the core of our civilization.

There are undoubtedly some individuals who have captured large slices of the social surplus under our current copyright regime and who also happen to share my values. Yet, for the most part, the values of the modern entertainment industry that copyright protects and enables are far from, if not anathema, to my own. I prefer copyright minimalism to copyright maximalism because I believe that adopting copyright minimalism will allocate more of society's surplus to those who share my values. Simply put, I would rather live in a society where the Neil Armstrongs of the world have more power to shape that society's future than the Ryan Goslings. Even knowing nothing regarding the content of their respective characters, the nature of the work performed would lead me to give Neil Armstrong more influence over the shape of our society than Ryan Gosling. After all, Neil Armstrong worked with others on a day-in-day-out basis for years and risked his life to accomplish what no person before him had. In contrast, over the course of a few months, Ryan Gosling read words written by another and followed the direction of yet others (trying) to create the appearance of someone we liked and cared about. If I am going to entrust one of these individuals with more of society's surplus, and hence more financial, political, and culture power to shape our society's future, on that basis alone, I would entrust more of society's surplus to the people who actually did something—people like Neil Armstrong.

How we allocate society's surplus also shapes our perceptions of who matters in our society. It helps determine who our heroes are. If we

adopt copyright minimalism, we allocate more of the surplus to astronauts, doctors, teachers, and fire fighters. With copyright maximalism, on the other hand, we allocate more to rock and movie stars. We used to be a nation of people who do things. Increasingly it seems, we are becoming a nation of people who watch as others pretend to do things. Moreover, the choice between copyright minimalism and copyright maximalism may tend to hold up one group or the other to our children as the people whose opinion matter in our society. But that is extremely problematic. As much as I enjoy Alyssa Milano as an actress, her views on vaccinations are simply wrong. Yet, the wealth and fame that copyright maximalism bestows on her gives her a platform to espouse her views, as if they mattered as much or more than those of medical and public health professionals who are better informed on the subject.

I recognize, of course, that you may disagree. You may value form over substance. You may believe that Ryan Gosling should earn more for pretending to walk on the moon than Neil Armstrong earned for actually walking on it. You may prefer to live in a society where Ryan Gosling has more power, financially, politically, and culturally, than Neil Armstrong to shape that society's future. The difficulties in implementing the first principle are thus two-fold. First, even if we agree on what constitutes a better society, we may find it difficult to allocate society's surplus in a way that leads to that better society. Second, we may disagree on what constitutes a better society. While these difficulties exist, they do not undermine the central truth underlying the first principle. Those to whom we allocate more of society's surplus will have more power to shape society moving forward. We should therefore allocate more of society's surplus to those who will use it to create the sort of society in which we want to live. If we cannot tell how to do that, or we are deadlocked on what values we want to promote, then those problems lead us to the second principle.

Given a choice between concentrating surplus in the hands of the lucky few and dispersing it to the many, we should disperse the available surplus to the many. Dispersing the surplus and ensuring a more even distribution of income allocates the power to shape society and its values to the many rather than the idiosyncratic few. On any given issue, whether religious beliefs or gender equality, there are likely to be a range of perspectives. As an alternative to the first principle, under which we allocate surplus to those who share our own perspective, the second principle, ensuring income equality and dispersing the surplus, tends to ensure that the surplus is allocated proportionally to the fraction of the population that holds a particular perspective. It thereby allocates wealth,

and thus power, to the majority. If we define as extreme those perspectives held by a very small fraction of the population, dispersing the surplus evenly tends to allocate a correspondingly small fraction of the surplus to those with extreme views. Income equality thus tends to minimize the influence of those who hold extreme views in two ways. First, it allocates extremists a proportionally smaller slice of the surplus to use to promote their views. Second, income equality also allocates the majority non-extremists a proportionally larger slice of the surplus to use as overwhelming counterweight.

The alternative, where we concentrate the surplus in the hands of the lucky few, risks handing a disproportionate share of the social surplus to someone who holds extremist views. Of course, sometimes concentrating surplus in the hands of the lucky few will turn out well for society when the few use that wealth and power to build a better society. But there is no necessary correlation between the desire to do good for society and the ability to capture a large share of society's surplus. When laws and markets allocate large slices of society's surplus to the lucky few, and do so randomly with respect to the few's intent for using that surplus, it is just as likely that the few will devote that surplus and the power it gives them to promote values contrary to those held by the majority.

Thus, to better align use of the surplus with the values held by the majority, a more equal distribution of income that disperses society's surplus among the many is preferable to concentrating it among the random few. For that reason, copyright minimalism is preferable to copyright maximalism. Copyright maximalism tends to concentrate extreme wealth and hence power in the hands of the randomly selected few. We can demonstrate this empirically by examining the Gini coefficient for copyright and non-copyright income. Named after Italian sociologist Corrado Gini, who first proposed it, the Gini coefficient is a statistical measure of equal distribution.[44] With perfect equality in income distribution, each citizen in a society earns exactly the same amount. With such perfect equality, the Gini coefficient is zero. In contrast with perfect inequality, one citizen earns everything, and everyone else earns nothing. In such a society, the Gini coefficient would be one or 100%. Today, the most common use of the Gini coefficient is as a measure of the extent to which income in a society is evenly distributed. The Central Intelligence Agency, for example, has estimated that worldwide, Gini coefficients on family income range from over 60% in countries such as Lesotho, South Africa, and Haiti, where income distribution is highly unequal, to under

44. *See* Corrado Gini, *Measurement of Inequality of Incomes*, 31 ECON. J. 124 (1921).

30% for countries such as Germany, Norway, and Sweden, where income is more equally distributed.[45] The CIA estimates the Gini coefficient for the United States as 45%, falling between Iran at 44.5% and Saudi Arabia at 45.9%.[46]

While the Gini coefficient for family income in the United States may seem high, it is nothing compared to the Gini coefficients for income or demand distribution in various copyright markets. Table 1 provides estimates for Gini coefficients for a variety of copyright markets.

Table 1.Copyright is Distributive Injustice: Gini Coefficients in Copyright Markets[47]

Market	Gini Coefficient
2018 Album Sales	0.9827
2019 Domestic Box Office	0.9209
1993 UK Songwriter PRS Royalties	0.9591
Distribution of Players on Steam PC Videogames	0.9925
2018 U.K. Author Copyright Income	0.74

The very high Gini coefficients in the markets for copyrighted works that Table 1 presents, reflect the winner-takes-all nature of these markets. A handful of superstar artists and authors capture nearly all the income,

45. Central Intelligence Agency, *Country Comparison: Distribution of Family Income – Gini Index*, THE WORD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html [https://perma.cc/4DBH-SB3H].

46. *Id.*

47. *See* Glynn S. Lunney, Jr., *Copyright's Excess Revisited*, 6 TEXAS A&M PROP. L.J. (forthcoming 2020). The Gini coefficients in Table 1 are calculated from data in Lunney, *Copyright and the 1%*, *supra* note 30; MONOPOLIES AND MERGERS COMM'N, PERFORMING RIGHTS: A REPORT ON THE SUPPLY IN THE U.K. OF THE SERVICES OF ADMINISTERING PERFORMING RIGHTS AND FILM SYNCHRONIZATION RIGHTS 65 (1996); *Domestic Box Office For 2019*, BOX OFFICE MOJO (Oct. 7, 2019), https://www.boxofficemojo.com/yearly/chart/?page=1&view=releasedate&view2=domestic&yr=2019&p=.htm [https://perma.cc/NA87-9562]; MARTIN KRETSCHMER ET AL., UK AUTHORS' EARNINGS AND CONTRACTS 2018: A SURVEY OF 50,000 WRITERS 20 (2019); BuzzAngle Music Admin, *BuzzAngle Music 2018 Report on Music Consumption*, BUZZANGLE MUSIC (Jan. 3, 2019), https://www.buzzanglemusic.com/buzzangle-music-2018-report-on-music-consumption/ [https://perma.cc/525V-RMWZ].

leaving only scraps for the rest.[48] By way of contrast, the Gini coefficient on skilled labor income in the U.K. was 0.13.[49]

It may be that a Gini coefficient greater than zero is necessary to maximize output in a society by ensuring higher rewards for those who are more productive. It may also be that a Gini coefficient too close to one will reduce a society's output by leading to social unrest, reducing opportunity for those with less, and pushing some of the most successful onto the backward-bending portion of the labor supply curve. In our tale of two copyrights, however, we put these efficiency concerns to one side. The question we are asking is how to distribute society's income if we assume that how we distribute society's income will have no effect on output. Under that assumption, the goal is to distribute income across society as evenly as possible. In other words, if unequal income distribution does not increase output, we should strive for a Gini coefficient of zero.

Copyright maximalism will not serve that distributional goal. As the Gini coefficients in Table 1 establish, the demand in the markets for copyrighted works is highly skewed. The top ten percent of the works, whether books, movies, songs, or videogames, captures from 70 to nearly 100% of the demand and hence income.[50] As a result, rather than disperse society's surplus more broadly by ensuring income equality, copyright maximalism does just the opposite. Because most copyright markets are winner-takes-all, or at best winner-takes-most, copyright maximalism tends to concentrate society's surplus in the hands of a very few superstar authors and artists. The more of a society's income that is channeled through the copyright system, the more unequal income distribution in that society becomes.

Moreover, copyright selects the winners in its winner-takes-all markets on the basis of characteristics such as looks, voice, likability, or

48. Some of the numbers in Table 1 reflect income distribution to corporate entities that may in turn be redistributed to executives and shareholders in ways that reduce the Gini coefficients. However, two of the figures—that for UK songwriters and that for UK authors—reflect final payouts to individuals. The Gini coefficients, even for those individual incomes, remain sharply higher than the Gini coefficient for income generally, even compared to the countries with the highest levels of income inequality, such as Haiti and South Africa.

49. *See* KRETSCHMER ET AL., *supra* note 47, at 20.

50. *See* Lunney, *Copyright and the 1%*, *supra* note 30 (estimating that the top ten percent of videogames on Steam captured nearly 90% of the videogame players); *Domestic Box Office For 2019*, *supra* note 47 (providing data that shows that the top ten percent of movies earned 75.5% of the domestic box office from January 1, 2019 through October 6, 2019); KRETSCHMER ET AL., *supra* note 47, at 20 (estimating that 70% of copyright income for books flowed to the top ten percent of authors); BuzzAngle Music Admin, *supra* note 47 (providing data that shows that the top ten percent of albums captured over 98.5% of sales).

programming skills, which are almost entirely orthogonal to whether any given winner will use the resulting surplus allocated to them to build a better society or destroy it entirely. Winning the copyright lottery does not even require the extensive schooling or long apprenticeship periods that success in other fields, such as medicine, law, or business, often requires. While not perfect screens, both extensive schooling and long apprenticeships can help weed out those whose values are entirely antithetical to society's before bestowing wealth on them.

In the end, whether copyright bestows vast wealth on its chosen few more or less randomly than other market mechanisms, or the legal rules governing inheritance for that matter, is not the key point. I frankly acknowledge that generally the market is not a meritocracy. As discussed, the market does not bestow larger slices of society's surplus on those who create more value or who are otherwise more deserving. Rather the market bestows larger slices of society's surplus on those for whom a lucky combination of government regulation, legal rules, and technology enables a value-based or monopolistic, rather than a cost-based or competitive return. The key point is that any set of legal rules, such as copyright maximalism, that tends to concentrate society's surplus in the hands of the lucky few risks giving those few the power to shape society in ways contrary to the values of the majority of the population. For this reason, a more even distribution of surplus is preferable. Because copyright markets tend to be winner-takes-all, copyright minimalism tends to ensure such an even distribution. That puts the power to shape the future of our society in the hands of the majority of the population. In a representative democracy, that is where the power, in my opinion, belongs.

V. ARTICLE 17 AND THE VALUE GAP REVISITED

The copyright maximalism Article 17 embodies is therefore generally undesirable. However, Article 17 itself seeks to redistribute wealth in the one situation where copyright maximalism may tend to disperse rather than concentrate society's surplus. Specifically, it seeks to force Internet platforms generally, and YouTube specifically, to share more of their rents with copyright owners and related rights holders. Where an intermediary in a copyright market is a natural monopoly, broader, rather than narrower, copyright can force that intermediary to share its natural monopoly rents with copyright owners. Moreover, it can do so without directly raising the price for access to the copyrighted works

at issue to consumers. In that one situation, copyright maximalism may have some tendency to disperse society's surplus.

Take broadcast radio, for example.[51] If there were competition between radio stations in a given market, and consumers disliked listening to advertisements, then each station would run only enough ads to cover its operating costs. If any given station tried to raise its "price" by running more ads, consumers would simply switch to another station. In such a competitive intermediary market, creating a public performance right and requiring the stations to pay a public performance royalty for broadcasting copyrighted music would require more ads to cover that additional cost. As a result, broader copyright would reduce access to music. Before enacting a public performance right, we would therefore have to consider whether some efficiency gain, such as increased creative output from the license royalties, justified that lost access. However, the market for radio broadcasts may not be so competitive. Traditional analog radio has high-fixed and low-marginal costs and must broadcast over a limited frequency spectrum. As a result, even without copyright, broadcast radio has a natural monopoly character. If there is only one radio station playing a certain genre of music in a given geographic area, and again consumers dislike ads, that station will run ads until its profits are maximized. It will trade off more money from more ads against less money from fewer listeners to identify the percentage of airtime to devote to advertisements so that the station maximizes its profits.

In such a natural monopoly setting, adopting a public performance right will not increase the number of ads the station runs. There is therefore no lost access. But such a public performance right will force the radio station to share some of its monopoly rents with the songwriters who made those rents possible. Thus, any tendency for the resulting royalties to increase creative output may justify enactment of a public performance right in such a natural monopoly setting. More importantly for the purpose of this discussion, even if there is no increase in creative output, and requiring public performance royalties merely redistribute rents from the radio station to songwriters, in this one setting, that rent redistribution may have some tendency to disperse society's surplus. It can redistribute at least some of rents from the one, the radio station, to the more than one, the songwriters.

I believe that is what Article 17 is trying to do. It is an attempt to force YouTube to share more of its rents with copyright owners and

51. I have first explored this example elsewhere. *See* Glynn S. Lunney, Jr., *Aereo and Copyright's Private-Public Performance Line*, 162 U. PA. L. REV. ONLINE 205 (2014).

related rights holders without increasing the price of YouTube to consumers.[52] If Article 17 could accomplish this result, then it might serve to disperse rather than concentrate society's surplus, and, based upon our distributional principles, be desirable. Unfortunately, it is not likely to achieve this goal.

One key difference between traditional analog intermediaries, such as radio broadcasters, and the new digital intermediaries, such as YouTube, is that the digital intermediaries are not necessarily natural monopolies. On the Internet, a bandwidth limit does exist, but it does not bind as tightly as the frequency limit for radio broadcasts. Moreover, the cost structure is not the same. On the Internet, there could, as a practical matter, be dozens, if not thousands, of video sharing sites or music streaming services. Yet, there are only a few. If we look for the reason why, we find copyright. It is copyright that has made YouTube the monopoly it is today. The high cost of copyright licensing, together with the high cost of defending against bogus copyright infringement claims, have imposed an unnatural monopoly character on Internet intermediaries that would not otherwise be present. Consider Veoh, for example. Veoh sought to become a video sharing website similar to, and in direct competition with, YouTube. Copyright owners sued the website, as well as its investors, for copyright infringement (and sued YouTube as well). After nearly six years of litigation, Veoh prevailed.[53] Even so, it spent its money on litigation, rather than innovation. (YouTube was able to afford defending against similar baseless copyright claims only because Google bought it.) As a result, Veoh has yet to become an effective substitute for YouTube.

From a distributional perspective, it would be preferable to introduce competition into the markets of these platform intermediaries. By doing so, we could redistribute some of the rents YouTube and other platforms are now capturing and return them back to consumers. To disperse rather than concentrate society's surplus, we should strive to reduce the rents that YouTube is capturing. Proponents of Article 17 do not share that goal. They are perfectly happy to allow YouTube to capture even more rents as long as copyright owners and related rights holders get a larger share of those rents. Ironically, they believe that the answer to a problem that copyright created is more copyright. The funny thing is, Article 17 is likely to cement YouTube's monopoly position by raising the costs of

52. In terms of politics, it is also an attempt to redistribute rents from an American company, YouTube, to copyright owners and related rights holders, at least some of whom are European.

53. *See* UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 718 F.3d 1006 (9th Cir. 2013).

entry for future, would-be competitors. As a result, the most likely consequence of Article 17's enactment is to increase YouTube's rents, but decrease the share of those rents going to copyright owners and related rights holders.

Indeed, precisely to the extent that it raises the cost to enter the video sharing market, Article 17 is likely to decrease the licensing fees YouTube pays copyright owners and related rights holders. With its state of the art, ContentID system, YouTube probably already complies with Article 17. Thus, enacting Article 17 changes nothing for YouTube itself. However, enacting Article 17 imposes substantial compliance costs on potential new entrants into the video sharing market. It thereby creates a barrier to entry. This will tend to reinforce YouTube's monopoly position. As a monopoly supplier of video content, YouTube can extract rents from its customers—those who view videos. Reinforcing that market power by creating a new barrier to entry will tend to make those rents higher. At the same time and precisely to the same extent that YouTube is a monopoly supplier of videos on the Internet, YouTube is also a monopsony buyer of that same video content.[54] As such, reinforcing YouTube's market power will tend to reduce the price it pays for that content. This, at least, is the prediction of traditional economic theory. When a company has market power as a good's seller, or "monopoly," consumers of that good pay higher prices. When a company has market power as a good's buyer, or "monopsony," suppliers of that good receive a lower price. If that theory proves accurate in this case, Article 17 will tend to increase the rents YouTube captures but reduce the rents it shares with copyright owners and related rights holders.

Moreover, even if we assume that YouTube is a natural monopoly because of network effects, and even if we assume further that Article 17 will achieve some rent redistribution from YouTube to copyright owners and related rights holders, Article 17 would still leave society's surplus far more concentrated than an approach that sought to reduce YouTube's rents directly. Indeed, it is far from clear, as a purely distributional matter, that any redistribution Article 17 achieves will materially or significantly disperse society's surplus. Like other copyright markets, the demand for videos on YouTube is not quite winner-takes-all, but it is highly skewed. In the music video market, nearly 90% of views go to the top ten percent of the videos.[55] As a result, any rents Article 17 redistributed to copyright

54. JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1969).

55. *See* BuzzAngle Music Admin, *supra* note 47 (showing that of just under 500,000 music videos streamed in 2018, the top 50,000 or roughly ten percent received 87.1% of the total music

owners and related rights would remain highly concentrated. If our distributional goal is to disperse society's surplus evenly across all members of society, Article17 will not achieve that. At best or worst, depending on one's perspective, Article 17 will merely redistribute a slice of society's surplus from one small group of computer programmers, and their associated investors and shareholders, to a different, but equally small group of songwriters and musicians, and their associated investors and shareholders.

VI. THE PROBLEM WITH A VALUE-BASED ECONOMY

Distributional choices have consequences. In thinking about those consequences, the first step is to be honest when legal change is designed to achieve distributional, rather than efficiency, goals. Honesty will open up additional solutions that can address the issue with fewer unintended consequences. If the goal is to redistribute some revenue from YouTube to YouTube stars, Article 17 is not the answer. To the contrary, it is likely to make the existing distributional problem worse. If the goal is purely distributional, an express tax-and-redistribution scheme can almost always achieve the redistributive goals with fewer unintended consequences than an adjustment of property rights.[56] Of course, being honest has its downsides. First, for those seeking the redistribution, their demands become less persuasive. I cannot see any reason to spend scarce resources trying to redistribute wealth from one group of rich people, such as Larry Page and Sergey Brin, just to give it to a different group of rich people, such as Paul McCartney. Second, and more problematically, once naked redistribution becomes the acknowledged norm, individuals will start investing more of their available resources in socially wasteful rent-seeking and less to productive economic activities. People will invest their scarce resources in lobbyists as they squabble over how to divide the existing pie, rather than invest those resources in baking three more.

Nevertheless, if we are going to enact laws to achieve redistributive goals, as Congress and the EU have recently done in the copyright space, then such redistributions should follow two principles. First, ensure legal rules that will lead more of society's surplus to those who will do good with it. Often, however, we cannot be sure who that will be. We may even disagree on what constitutes "good." For me, at least, on this principle, those who copyright has made rich are among the last people to whom I

video streams).

56. This, of course, is the general conclusion of law and economics scholars on this issue. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 7–9 (6th ed. 2012).

would entrust society's surplus. More generally, however, I would prefer to focus on the second principle in making distributional choices: Adopt the legal rule that disperses, rather than concentrates, society's surplus. This leads to a preference for competitive markets generally. With respect to copyright specifically, copyright markets tend towards winner-takes-all. As a result, this "disperse the surplus" principle leads to a strong preference for copyright minimalism over copyright maximalism.